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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

Nos. 709, 733

CATHERINE MUTH, ADMINISTRATRIX OF THE ESTATE OF CLEM MUTH, DECEASED,

Petitioner,

No. 709 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOLLIE DARR, ADMINISTRATRIX OF THE ESTATE OF KURT DARR, DECEASED,

Petitioner,

No. 733 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOTION FOR LEAVE TO FILE SECOND JOINT PETITION FOR REHEARING AND SECOND JOINT PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

MOTION FOR LEAVE TO FILE SECOND JOINT PETITION FOR REHEARING.

Petitioners, Catherine Muth, administratrix of the estate of Clem Muth, deceased, and Mollie Darr, administratrix of the estate of Kurt Darr, deceased, by reason of the de-

cision of this Court in *Hopson* v. *The Texas Company*, No. 818, October Term, 1965, entered February 28, 1966, 34 Law Week 2393, move for leave to file a second petition for rehearing pursuant to the authority of *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183 (1956); *United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957); and *Gondeck* v. *Pan American World Airways, Inc.*, 382 U. S. 25 (1965).

The United States Court of Appeals for the Seventh Circuit reversed a judgment for petitioners sustaining their claims under the Jones Act, Title 46 U. S. C. § 688, in the United States District Court for the Northern District of Illinois, after a trial before the court sitting in Admiralty in a proceeding brought by respondents' decedent for exoneration from or limitation of liability under Title 46 U. S. C. § 183. This Court denied petitions for certiorari on January 17, 1966, Mr. Justice Black dissenting, and denied a petition for rehearing on February 21, 1966. The cause is still pending in the United States Court of Appeals on respondents' motion to tax costs and petitioners' answer thereto seeking affirmative relief. The mandate of the United States Court of Appeals has not issued as of this date.

It is believed that had the *Hopson* decision been announced earlier, the result here would have been different.

Respectfully submitted,

G. Kent Yowell,
Counsel for Petitioner in No. 709.

Harold Liebenson,
Edward G. Raszus,
Counsel for Petitioner in No. 733.

SECOND JOINT PETITION FOR REHEARING.

Catherine Muth, petitioner in No. 709, and Mollie Darr, petitioner in No. 733, jointly and respectfully petition for rehearing on the following grounds:

On February 28, 1966 the Court in a *per curiam* decision, Mr. Justice Harlan dissenting, held that the operational activity doctrine announced in *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U. S. 326, to give "an accommodating scope . . . to the word 'agents' " as used in § 1 of the Federal Employees' Liability Act, Title 45 U. S. C. § 61 et seq., the standards of which are incorporated in the Jones Act, Title 46 U. S. C. § 688, applied to the activity of transporting ill seamen by an independent taxicab company to a consular office in Trinidad in order for arrangements to be made for the transportation of the two seamen back to the United States, which was a necessary prerequisite to their discharge. *Hopson* v. *The Texas Company,* No. 818, October Term, 1965, ... U. S. .....

In the instant case we sought to show that the shipyard and its agents were agents of the Jones Act employer, Atlass, under the operational activity doctrine as understood from *Sinkler.* (No. 709 Reply Brief in support of Petition for Writ of Certiorari with additional appendix, p. 3.) The Court of Appeals had indicated to the contrary. (350 F. 2d 592, 599.)

If the activity in *Hopson* is within the operational activity doctrine, then certainly the activity of the shipyard company, making temporary repairs upon the vessel in this case, was an operational activity and the Jones Act employer is liable for the negligence of the shipyard in failing to maintain a safe, adequately lighted means of ingress to the vessel.

We also submit that under *Hopson* the taking of Muth and Darr from the tavern to their quarters on the vessel was an operational activity. The Court of Appeals held to the contrary. (350 F. 2d 592, 597-598.)

Clem Muth was helplessly intoxicated; he was incapable of caring for himself because of acute alcohol poisoning. In an enlightened society his condition is recognized as an illness which, of course, medically speaking, it was. He would not be left in the street where he fell in front of the cafe. (App. 36, 41-42, 57-58.)

A helplessly intoxicated seaman is not *caput lupinum;* nor is passive intoxication disqualifying gross or wilful misconduct. *McDonough* v. *Buckeye Corp.,* 103 F. Supp. 473, aff. C. A. 6, 1952, 200 F. 2d 558; *Olson, Administratrix* v. *New York Central Railroad Co.,* C. A. 2, 1965, 341 F. 2d 233; *Bentley* v. *Albatross S. S. Co.* (C. A. 3, 1953), 203 F. 2d 270, 272-274.

In *Bentley* v. *Albatross S. S. Co.* (C. A. 3 1953), 203 F. 2d 270, 272-274, the court said:

> "* * * [D]id the libellant's intoxication operate to bar his recovery of (1) damages and (2) maintenance and cure [?]
>
> "As to damages: We are of the opinion that where liability exists by reason of the vessel's unseaworthiness or negligence, an injured seaman is not barred from their recovery merely because he was intoxicated at the time of injury. Intoxication, where it contributes to a seaman's injury, constitutes contributory negligence on his part and operates only to mitigate the damages. As to maintenance and cure: It is our opinion, for reasons later stated, that under the circumstances of this case libellant's intoxication was not a bar to his recovery.
>
> "It is true that in a number of cases intoxicated seamen have been denied recovery of damages and main-

tenance and cure because they were intoxicated at the time of their injury, but an analysis of these cases discloses the absence of unseaworthiness or negligence on the part of the vessel as a factor in the situation. For example, in the S. S. Berwindglen, 1st Cr. 1937, 88 F. 2d 125,[*] where recovery of both damages and maintenance and cure were denied, an intoxicated seaman, injured in a fall from a ship's ladder which was in proper condition and well lighted, the Court noted the factor of the absence of unseaworthiness. Likewise, the United States Court of Appeals for the Second Circuit, in *Barlow* v. *Pan American S. S. Corp.*, 1939, 101 F. 2d 697, 698, in affirming a denial by the trial court of damages and maintenance and cure when an intoxicated seaman was injured when he fell from a ship's ladder noted specifically that (1) 'The ladder was in perfect condition and well lighted,' and (2) '* * * seaman's injuries occurred solely because of his intoxication * * *.' In *Lortie* v. *American-Hawaiian S. S. Co.*, 9 Cir., 1935, 78 F. 2d 819, 821, there was an affirmance of a denial by the trial court of damages and maintenance and cure where the seaman '* * * was injured during a drunken brawl * * *' which he started and neither unseaworthiness nor negligence of the vessel was a factor. * * *

"* * * We do not agree that recovery of *maintenance and cure* is forfeited by the mere circumstance that the injured seaman is intoxicated at the time.

"It is pertinent to note that the late Judge Dickinson in The Quaker City, D. C. E. D., Pa. 1931, 1 F. Supp. 840, in a case where there were absent the factors of either unseaworthiness or the vessel's negligence, held that an injured seaman's intoxication did not per se forfeit his right to maintenance and cure. He

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[*] *S. S. Berwindglen*, 1st Cir. 1937, 88 F. 2d 125 and *Barlow* v. *Pan American S. S. Corp.*, 1939, 101 F. 2d 697, are cited and relied on by the Seventh Circuit Court of Appeals in the instant case. 350 F. 2d 592, 597.

there drew a distinction between innocent involvement of an intoxicated seaman in a brawl and one who was its instigator. In the first instance there is no wilful misconduct; in the second there is, Judge Dickinson held.

"The District Court in the instant case did not apply the test prescribed in The Quaker City, supra, and ruled the libellant's intoxication to be an act of 'gross and wilful misconduct' forfeiting his right to maintenance and cure.

"* * *.

"While there has not been an express ruling on the issue by the Supreme Court,[*] that Court has, however, afforded us an illuminating guide in discussing the maintenance and cure rule in a number of cases. The sum total of observations made by the Supreme Court in these cases is that in applying the maintenance and cure rule, seamen, even though erring and careless, as wards of courts of Admiralty should be the beneficiaries of a liberal attitude in consonance 'with the dictates of sound maritime policy.'

"* * *.

"Applying these concepts of the maintenance and cure rule we are of the opinion that a seaman's becoming intoxicated while on shore leave in a foreign port on a holiday is not an act of wilful misconduct barring his recovery of maintenance and cure for injuries sustained when he slumped in a drunken stupor on an unguarded (and thus unseaworthy) hot radiator in the vessel's recreation quarters."

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* A want of an express ruling was likewise noted by the court below. 350 F. 2d 592, 596.

Frank Johnson, who was an agent in charge of the crew in Atlass' absence, took Smith, Muth and Darr to dinner (the galley on board ship being closed), accompanied Muth and Darr to a movie, and went with them to the tavern. He testified that "I don't remember the exact time that

we departed or parted company." (App. 28.) He did not assist in taking Clem Muth back to the vessel.

Smith,the Chief Engineer of the vessel, with some measure of authority over the crew himself, in undertaking to take Muth back to the vessel with the assistance of Darr, was performing an operational activity of the vessel: caring for an ill seaman.

Smith unfortunately performed this task negligently. He did not seek the assistance of the shipyard's night watchman, Gildersleeve. Under the circumstances, he should not even have attempted the return to the vessel, there being no safe way provided by the shipyard or the Jones Act employer, Atlass, for ingress to the vessel. (F. of F. 40, App. 77.) At the very least, he should have assisted Darr with Muth on the narrow, poorly lighted walkway. The Court of Appeals, however, assuming his negligence, held he was not within the scope of his employment. Under *Hopson* he was.

Darr, without assistance from Smith, was unable to manage Muth, who fell into the 32 inch unprotected, unbridged, gap between the walkway and the marine railway. Darr then jumped in to save Muth from drowning. In so doing, Darr was performing a previously recognized operational activity of the vessel. *Kirincich* v. *Standard Dredging Co.*, C.A. 3, 1940, 112 F. 2d 163, 164-165.

We respectfully petition that because of the decision in *Hopson,* which Mr. Justice Harlan describes as an extension of the doctrine in *Sinkler,* that the order of February 21, 1966 denying the petition for rehearing be vacated, that a rehearing be granted and that the petitions for certiorari be granted. We pray the Court, in its discretion, to take these cases for plenary consideration, or to vacate the judgment of the Court of Appeals and remand

these cases to that court for consideration of the questions which were not there reached.

Respectfully submitted,

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HAROLD A. LIEBENSON,
EDWARD G. RASZUS,
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CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Second Joint Petition for Rehearing is presented in good faith and not for delay. We further certify that it is restricted (a) to substantial grounds available to petitioners although not previously presented, *Schriber-Schroth* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, and (b) to an intervening circumstance, being a decision of this Court rendered and reported subsequent to the denial of the petition for rehearing and believed to be of substantial effect. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1.

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